Sullivan v. Little Hunting Park, Inc.

Oral Argument - October 13, 1969

Warren E. Burger

Sullivan against Little Hunting Park Incorporated.

Mr. Brown, you may proceed whenever you're ready.

Allison W. Brown, Jr.

Mr. Chief Justice and may it please the Court.

This case is before the Court for the second time having been here previously on order of this Court granting a petition for writ of certiorari at the same.

At same time is which the Court vacated the judgment of Virginia Supreme Court of Appeals and remanded the proceeding to the Virginia Supreme Court of Appeals for further consideration in light of the case of Jones against Alfred H. Mayer Company.

That was in the 1967 term of the Court.

Last year, the Virginia Supreme Court of Appeals after we seek of this Court's mandate refused to accept the remand to reconsider the case in light of the Mayer case and issued an opinion indicating that it would not take the case back for the same reason that it refuse to entertain the appeals on the first occasion.

The reason stated being petitioners alleged failure to comply with certain procedural rule of the Virginia Supreme Court of Appeals.

The Court indicated that it did not had jurisdiction over the proceeding in the first instance and that therefore did not have jurisdiction to accept the remand.

We petition for certiorari and the Court -- the case is now here again on the Court's granting of this second petition.

By granting the first petition for certiorari, the Court impliedly held that the nonfederal ground of decision for the State Court with the nonfederal ground upon which the State Court decided the case was inadequate to support the judgment and that the federal question should therefore be examined.

The State Court by failing to accept the remand, by failing to comply with this Court's mandate, we submit has fail to observe its responsibilities under the Supremacy Clause of the Constitution.

We are now before the Court with the case on the merits.

The case -- the principal issues in the case concern the matter of whether a community recreation association may engage in racially discriminatory policies and practices within the -- under the proscriptions contained of the 1866 -- Civil Rights Act of 1866 which this Court construed in Jones against Alfred Mayer Company.

And whether also those racially discriminatory practices are banned or prohibited by the Due Process Clause of the Fourteenth Amendment.

The second question -- major question that is, is whether a party was a member of this local recreation association and dissents from its policies may consonant with the protections afforded by the 1866 law in the Constitution be expelled for his dissent.

Briefly, the facts are that Little Hunting Park Incorporated is a nonstop corporation organized under the Virginia law for the purpose of providing a community recreation facility.

It has a swimming pool, tennis courts and a park and picnic area.

The bylaws has provide that its facilities are available and membership is available to anyone living within prescribed neighborhood, a prescribed geographic area consisting of four real estate subdivisions plus such adjacent areas or additional areas as the Board of Directors might decide.

The membership in the association is obtained by the purchase or assignment of shares.

Shares maybe purchase for a sum of money and they may also be obtained upon assignment from landlord to tenant, these are provisions of the bylaws.

There is a limit of 600 shares in the association and the record shows that in the history of this association's existence namely from 1955 to 1965 -- excuse me, 1965 to 1966 when the trial was held.

Shares had been uniformly permitted that is assignment and transfer of shares have been uniformly permitted by the Board of Directors of the association all such purchases and assignments of shares being subject to approval.

The only occasion for an the assignment or refusal to permit an assignment having occurred at the time of the incidents which are alleged to herein to be the basis for this action namely the refusal to permit the assignment from the one pool of Sullivan, to Dr. Theodore Freeman because of the latter's race -- the -- Dr. Freeman being a Negro.

The situation involving these two parties came about as follows: Mr. Sullivan, a

white man had owned property in the neighborhood covered by the bylaws of the association and in 1955 or 1954 when the association have been formed had purchased a share which he used so long as he live in a house on Condor Road in Fairfax County, Virginia.

He, after 11 years, moved to another house as part of the purchase price of the second house purchased a second share in the association.

In the meantime, he continued to rent the first property and as part of the lease made a practice of assigning the share in the association that he'd purchased as to accompany the first piece of property of the first house.

So, Mr. Sullivan owned two shares, he owned two houses, the first house he rented out.

In 1965, rented the first house to Dr. Freeman and as part of the lease provided for the assignment of the share in the association it went along with that property.

Potter Stewart

Was this the first time he had rented that house?

Allison W. Brown, Jr.

No, this was not, he would have three prior tenants and on one and he had made a practice of assigning the swimming -- or the association membership share and at least the record shows that share has always been -- the assignments had always been approved by the Board of Directors.

Potter Stewart

With respect to three previous times?

Potter Stewart

Yes.

The -- what happened here was that the -- when Mr. Sullivan submitted the application for assignment of this share to the Board of Directors, the Board of Directors of the association disapproved it for the reason that Dr. Freeman and his family were negroes.

The --

Potter Stewart

Is there any remaining issue as to the question of the motivation for disapproval?

Is there any claim now that there was nothing --

Allison W. Brown, Jr.

No, there is no question -- I beg your pardon.

Potter Stewart

Is there any claim now there was any reason other than the fact that the applicant was a Negro that the membership --

Allison W. Brown, Jr.

So far as I know, there is no such claim sir.

There was a suggestion of this raised in the opposition to the first petition for certiorari or maybe it was a second petition and we filed a responds to that pointing out the point -- the place is in the record showing conclusively that race was the reason for the disapproval of the membership assignment and the issue has not been raised now in respondent's brief.

As a result of Mr. Sullivan's disappointment with the failure of the association Board of Directors to approve this assignment to Dr. Freeman, Mr. Sullivan sought to find out why the assignment had not been approved and he sought to within the association work out means within the neighborhood where this had occurred, he sought to bring about a reversal of the -- what he thought to be a discriminatory refusal to approve this assignment.

As a result of his activities with among, both within the association and among persons in the neighborhood such as leaders in the church, other community leaders, the association Board of Directors expelled Mr. Sullivan.

The two actions here seek: one, relief Mr. Sullivan, we seek his reinstatement into the association and damages for the injury that he has suffered by as a result of the expulsion; and secondly, we seek a -- damages for Dr. Freeman.

Dr. Freeman is no longer in the county, is no longer in the neighborhood, no longer lives in the neighborhood served by the association and although an injunctive remedy maybe a future value to him that it is of no immediate value because he doesn't live there and we seek damages on his behalf for the discrimination that he suffered.

We think there is little doubt but what the 1866 Civil Rights Act which this Court construed in Jones against Mayer applies to this, to the facts of this case that the provisions of law involved are contained presently in 42 U.S.C Sections 1981 and 1982.

The Section 1981 grants Negroes the same rights as white persons to make an enforce contracts.

Section 1982, provide Negroes -- grants Negroes the same right as white persons to inherit purchase and lease, real and personal property.

The -- we have shown, the record shows that the -- both of these provisions of the law are relevant here.

There was a contract between Mr. Sullivan and Dr. Freeman which provided for the assignment of the share involved and the Board of Directors of the association refused to permit the consummation of that -- or the performance of that contract because of the race of Dr. Freeman.

The -- so that would make Section 1981 applicable on its face, Section 1982 of 42 U.S.C. we believe is applicable under the -- by virtue of the fact that the shares of the membership share here is a personal property and the membership share also constitutes and membership in the association constitutes an incident of the real property and it indeed it was a part of the lease hold interest that Dr. Freeman obtained from Mr. Sullivan.

Mr. Brown, would this situation fall under the Civil Rights Act of 1968?

Allison W. Brown, Jr.

No, I don't believe so, Your Honor.

A part of the effective date --

Allison W. Brown, Jr.

Well, I'm not certain to that if -- I just don't know the answer sir.

When we started this action because this Court had not yet construed the Civil Rights Act of 1866, we press in addition a constitutional basis for our case.

Under this Court's decision in Evans versus Newton, we felt that this

association perform the same function as Bakers Field Park which was at issue in the Evans against Newton case namely that it was a public facility which provided public recreation and that it had all of the attributes of a public facility of the sort that were at issue in Evans against Newton.

We still would continue to press this as an alternative ground for a decision.

As far as Dr. Freeman is concerned, we think that both the 1866 law and constitutional provisions warrant his obtaining relief.

As far as Mr. Sullivan is concerned, the record shows that he was expelled from this association essentially for dissenting from its racially discriminatory policy.

He, under the law, was required to deal with Dr. Freeman on a nondiscriminatory basis.

When he sought to do so, his action was frustrated, it was thwarted and when he sought to reverse the action of the Board of Directors and engaged in legitimate means of dissent or legitimate means to try and reverse the Board of Directors' action, he was expelled, he was punished, the action was retaliatory, it was by way of reprisal and we indeed feel that this action may not be permitted to stand under relevant authorities.

The case that's most analogous is that of Barrows versus Jackson, which is discussed in our brief and in the amicus brief of the United States.

There, you will recall that a party who had failed to comply with a discriminatory racial covenant was sued for damages and this Court held that he could rely on -- that he could defend by relying on the constitutional right of the Negro who was involved that the law protected him in those circumstances.

We think that the circumstances here are certainly analogous.

The -- we have reviewed in our brief the various charges that were brought against Mr. Sullivan as the alleged basis for his discharge -- excuse me, the alleged basis for his expulsion.

We have demonstrated, I believe, that his expulsion was that there were whole series of charges that were brought against him that were in the nature of exaggerations and some instances alleged outright falsehood.

All of which served the purpose of which serves the pretext for the -- to mask the hostility that the, and resentment that the directors of this association felt against him first for creating this controversy by attempting to assign his membership to a Negro and then by not accepting the decision which they had made to deny the negro of the assignment.

The -- an important aspect of the case which I've not cared to over look and I'd like to deal with for moment if I may, concerns the matter of damages.

In a supplemental brief that we filed, we attempted to response to the point which the Government had made in its amicus curiae brief namely that the plaintiffs here may not be entitled to punitive damages because the Acts involved occurred before this Court had construed the 1866 law in Jones against Mayer.

We, I think, have responded to that in a sense of showing that punitive damages are not foreclosed merely because the action took what the acts took place before the resurrection of the 1866 law.

The point I would like to make is this and I did not cover this in our brief because, frankly, the -- what I am about to say had not quite jelled in my mind at the time I wrote the supplemental brief.

And that is that we feel that there is a right established on this record by both parties to compensatory damages for the injuries that they have suffered.

We think also that they are both entitled to punitive damages and we think that this is an important part of the case primarily in the case of Dr. Freeman because he is not in this country any longer.He is how with the United States Embassy in Tokyo.

The question of punitive damages, I think, as far as Mr. Sullivan is concerned is quite well shown or exploited in our brief and we showed it on the record.

His expulsion from the association was motivated by attitudes of hostility, resentment, a desire to act if by way of reprisal against him because of what he had done.

These are the elements of malice or these are the elements that constitute malice and which are basis for assessing punitive damages as far as Mr. Sullivan is concerned.

Potter Stewart

In Jones against Mayer, as I remember it, we didn't even decide that compensatory damages were available, is that correct?

Allison W. Brown, Jr.

That's correct sir.

Potter Stewart

Didn't we leave that question undecided of explicitly?

Allison W. Brown, Jr.

We left the question undecided, sir and there's -- I must say there's a somewhat, with all due respect, there is somewhat a footnote in that case, it's little hard to understand.

But, in which it suggested that the parties may not have on those pleadings made that a case warranting punitive damages.

Now, we when we ask for punitive, we've have asked for compensatory and punitive damages all the way along here.

And the thing that I want to indicate is that in the case of Dr. Freeman, there are no facts it might appear from the record which would warrant punitive damages.

But I would submit that he was the victim of racial discrimination and that racial discrimination as a matter of law warrants the imposition of punitive damages.

Race discrimination is unjustified, race discriminations cannot be rationalize to the law.

Race discrimination is based on hatred, prejudice, bias, it has no justification as it comes a matter of the employing malice.

There's malice in law, there is implied malice.

These are recognized in other fields of the law and we submit that when a person is the victim of racial discrimination, there is implied malice and that punitive damages are warranted.

We feel that it's particularly important here to -- in this respect and that is to achieve the full effectiveness of this 1866 Act that the Court would be well warranted in giving meaning to this concept of punitive damages.

There is indiligence to it the Court said that where suddenly protected rights have been invaded, it has been the rule from the beginning that the Courts will be alert to adjust their remedies so as to grant necessary relief.

Now, this case is probably one of the last perhaps sometime that will come before the Court involving this 1866 Act.

In order to give full effect to this law, we submit that punitive damages should be awarded and should be recognized as a valid remedy.

The 1964 Civil Rights Act, the public accommodation provisions of it have no damages remedy attached.

There is only injunctive relief that is allowed.

Since, if damages are allotted at all here, it seems to me, that it would be appropriate for the Court to spell out both the right of a party to obtain both the compensatory and punitive damages and as I say where punitive -- where discrimination against the Negro occurs for no other reason than his race or color punitive damage, it's an inherently malicious act, inherently malicious and punitive damages should be awarded.

Here, it's particularly appropriate, you know, because the Court -- the Board of Directors of this association refused repeatedly to ever meet Dr. Freeman.

Dr. Freeman was an eminently qualified individual.

He has a PhD degree from the University of Wisconsin.

He's an agricultural economist.

He's a captain in the District Columbia National Guard.

He had eminent qualifications, they never met him, they didn't want to meet him.

They knew he was black and that was enough.

That is malice in law and warrants punitive damages.

Thank you.

Do you know whether the 1968 Act provides for damages?

Allison W. Brown, Jr.

The Fair Housing Act in 1968 does provide for damages.

It does.

Allison W. Brown, Jr.

Yes.

Can you express it.

Allison W. Brown, Jr.

Yes, there are two provisions by which judicial relief can be obtained and one or the other, as I recall, provides for damages.

Potter Stewart

But only compensatory damages or does it include punitive damage?

Allison W. Brown, Jr.

I am sorry, I can't I'm not certain sir.

Potter Stewart

I don't know the answer.

Warren E. Burger

Mr. Harris.

John Charles Harris

May it please the Court.

The rules of procedure in the Virginia Supreme Court of Appeals required that counsel must serve the transcript on the serve and notice on the opposing counsel as to the tendering of transcript and give him a reasonable opportunity to examine it.

And on the basis of the failure in this particular case for counsel to serve need with an adequate notice, the Supreme Court of Appeals of Virginia refuse to hear this appeal.

Now, they based it on the case of Snead versus Commonwealth which was a criminal case in 1959.

Snead's counsel presented the transcript 30 minutes before -- to the counsel, before he submitted to the judge for certification and on the basis of this, the

Virginia Court said that 30 minutes was not reasonable and therefore since it was not reasonable and the requirement was jurisdictional.

Therefore, they would not hear Mr. Snead's appeal.

Mr. Snead served his five years in penitentiary.

Now, in the particular case that we have here, the opposing counsel and myself received notice three days after it was tendered.

One week later, --

(Inaudible) you had actual conversation.

John Charles Harris

I don't deny that, I received a telephone call.

-- can't go over the record.

The petitioner says that you had the record for five days of the up to that time and the judge postponed, the trial, and the postponed that for eight days he had an order give you the chance to look at the record, did you deny those acts?

John Charles Harris

I received a telephone call saying that the transcript would be tendered on a Friday --

Byron R. White

When did you received it?

John Charles Harris

On a Friday, a telephone call --

June the 9th, June the 9th.

John Charles Harris

June the 9th, on the 12th, that's about Friday afternoon sometime during at Friday afternoon.

And I understand it was dropped at the judge's secretary's desk.

The judge saw it on --

You are also told that the adversary would submit a motion for the correction if the record we're hearing on June 16, weren't you?

John Charles Harris

That's right on the 16th is when I received that the transcript.

Now, of course the Virginia Court construes this procedure is jurisdictional that it isn't up to me as in cases --

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Now, the question was, whether you in fact had notice, where you in fact examined this transcript before the judge signed the sentence.

John Charles Harris

Before the judge signed the -- yes, that was on the judge sign and I believe some after the 16th.

But it all found whether the instruction on the rule that you haven't had this opportunity before if it was given to the judge's secretary but before the following month? (Voice Overlap)

John Charles Harris

Right, the Virginia Court has construed this is not my responsibility as a response while the other counsel to get meeting --

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For us it would (Inaudible).

Byron R. White

I take it that the Virginia requirement is construed by the Virginia Court is double barrel, adequate notice of the time and place of tendering and inadequate opportunity to examine.

I don't suppose you would deny you have an adequate opportunity to examine this record.

It was there in the judge's office for a week, you could've examined it and you had the weekend to examine it.

You say, --

We did examine it.

John Charles Harris

Subsequently, I had it one weekend.

In fact, I think I had it for nine working hours to examine it.

Byron R. White

Well, you didn't complain that you have -- you couldn't make an adequate examination at that time, would you?

Yes, it was a very --

Byron R. White

Well, you did?

Where does that --

John Charles Harris

No, but I -- it's not in the record nor isn't in the record that I had it for nine hours.

But nine hours is a very extensive transcript and I just --

Thurgood Marshall

Did you object to the trial judge about all this?

John Charles Harris

Yes I did.

Thurgood Marshall

Where is that in the record?

John Charles Harris

I didn't -- again looking at Virginia law, I think it was necessary for me to put each one of these items in the record.

In fact the trial judge said, you don't have to worry, I'm going to note everything on the record and that's all you have to do and this is what he did and said I'm going to note on the record exactly when I receive it and in the record, there is a notification of the trial judge --

Thurgood Marshall

But did he also note that you objected to all of these?

If so, where?

John Charles Harris

No, there is no record that I have objected.

I did object but there is no record that I object.

Thurgood Marshall

Well, do you now say you were prejudice to all about these?

Did this interfere with your preparation of the defense to this appeal, how?

John Charles Harris

Because I was waiting for service to be made on the -- I was waiting for transcript (Voice Overlap) --

Thurgood Marshall

And how did that hurt you?

John Charles Harris

Well, it hurt me because I couldn't -- we didn't have the record.

The record was --(Voice Overlap)

Thurgood Marshall

-- the record does show that you did have the record.

The judge says you had the record, you could see it in his office that's what he said, didn't he?

John Charles Harris

In the judge's chambers.

Thurgood Marshall

Yes.

John Charles Harris

Until on 16th, I believe it was 16th I got on the Friday afternoon to return it on Monday.

Thurgood Marshall

Is that on Friday afternoon or Monday?

John Charles Harris

Friday afternoon and return, to return on Monday.

Thurgood Marshall

Is this the whole record here?

John Charles Harris

No, not this is just a portion of it, very extensive.

Thurgood Marshall

Did you ask for more time?

John Charles Harris

I'm certain I did, I raised the same question there that I didn't have sufficient time to read this extensive record and at that particular time, Mr. Brown said that he wanted it back by Monday and I used his copy and had his copy back on Monday to him.

Thurgood Marshall

Well, why he should keep it?

John Charles Harris

Because it was already given back to him on Monday.

Thurgood Marshall

Or you just did because he told you to do it?

Or is it the truth with the matter is that you show up to have this real good technicality you didn't have to anymore?

John Charles Harris

Now, very frankly I didn't.

I was incognizant of this requirement at that time, I wasn't so after which.

Thurgood Marshall

So, then you weren't hurt then, were you?

John Charles Harris

I was hurt insofar as I didn't have the time to prepare my case.

Thurgood Marshall

Well, you have plenty time.

I mean, how were you hurt by not seeing the record except over a weekend?

Is there anything in this record that's wrong?

John Charles Harris

The purpose of us getting together to correct the record was to correct the mistakes and I think in the record there is a statement there that it was very poorly taken and it needed substantial corrections.

And this, I didn't have the opportunity to correct.

Thurgood Marshall

Well, what in that hurt of case that must be corrected?

John Charles Harris

It's so extensive, I don't know what would --

Thurgood Marshall

It's so extensive.

You can't point to one instance.

John Charles Harris

Again, that my argument here is not whether I've been hurt or not but whether the Court of Appeals of Virginia is right in saying that this notice must be given and its jurisdictional that notice must be given beforehand.

Whether I've been hurt or not, I think this is not -- the Virginia Court is not concern whether I am hurt or not.

Thurgood Marshall

But you were given those?

John Charles Harris

Well, granted to that, if I were giving sufficient time, it's of course is to whether Virginia has the right to say that notice must be given in advance.

Hugo L. Black

Well, you had noticed didn't you but one in writing?

John Charles Harris

I gather the phone calls sometime when the last day, I don't remember what is all about that (Voice Overlap)

Hugo L. Black

-- in writing, isn't that right?

I think at noticed (Voice Overlap).

Hugo L. Black

Is that the only thing is that it was not and you claim was not in writing.

John Charles Harris

As I remember, I got telephone calls saying I'm going to get that over to the judge's chamber.

Hugo L. Black

Do you have any objection to that notice except that it was not in writing?

Warren E. Burger

In short that it didn't comply with the notice.

John Charles Harris

I expected the notice, I expect a notice.

Hugo L. Black

Do what?

John Charles Harris

I didn't do anything because I expected a notice.

I expected the law will be fulfilled.

Hugo L. Black

And I suppose we will reverse the Court down in Virginia, could you still try your case on these merits?

John Charles Harris

In Virginia?

Hugo L. Black

Yes.

John Charles Harris

I had to.

Hugo L. Black

Well, you could or couldn't?

John Charles Harris

I have to.

Hugo L. Black

And the only objection you have is that they didn't give you a written notice.

John Charles Harris

Which is already furnished, which the Virginia Court considers jurisdictional.

Hugo L. Black

That's a little fair, isn't it?

John Charles Harris

Well, the jury was fair.

In the case of Mr. Snead, the Court considered the jurisdictional with him and other cases, the Court considered it jurisdictional.

Now, this is (Voice Overlap) on the Court.

Byron R. White

Always considers jurisdictional, what about the Bolin case?

John Charles Harris

The Bolin case --(Voice Overlap)

Byron R. White

Bolin v. Laderberg, didn't seem to consider it jurisdictional there.

John Charles Harris

It goes back to the Code Section prior to the rule of the Court --

Byron R. White

I appreciate that but the requirement that must be in writing would you have said was the case here and that was jurisdictional.

It doesn't seem to have been jurisdictional in every case in which they considered the rule, have they?

John Charles Harris

Every case that I have seen where this question has been raised, the Court has ruled it jurisdictional.

Byron R. White

But what's the role of the court in Virginia also.

So, have seven Virginia and another 67 case.

John Charles Harris

Now, on this --

Byron R. White

Those -- they don't seem to consider it jurisdictional under all circumstances.

John Charles Harris

These particular cases' notice was given but the question was sufficiency of the notice.

Byron R. White

Yes, it wasn't written, neither of those cases.

John Charles Harris

I don't know, I presume it was written.

It doesn't say in here --

Byron R. White

Mind if I read this in it correctly.

John Charles Harris

Alright, going on to the 1866, Title 1982, I consider these all part of Title 42 and I think that if we are going to look at Section 1982 of Title 42, we must look at in under the doctrine of pari materia or construing all statutes on the same subject together.

We must look at the rest of Title 42 including that Section which is known as a Public Accommodations Law.

And this provides that all persons shall be entitled to the use of facilities.

Provided those facilities are Interstate Commerce, the segregation in those facilities are enforced by the State, State action.

And also it excludes from the operation of Public Accommodations Law any establishment which is not in fact open to the public, also it excludes clubs.

Now, in the transcript is a rather extensive coverage of the security that was available at this particular establishment to keep people out.

And the thing was not in fact open to the public, it was not -- there was no support of segregation by the State.

In fact, the defendants, the respondents in this case are very reluctantly before this Court, they were brought into Court.

They didn't ask State to enforce segregation.

In addition, we contend that Little Hunting Park is a club.

Now, if we're contending it as a club, we have to know what a club means.

Webster defines a club as an association of persons for some common object, specially one jointly supported meaning periodically.

Now, I refer to Black maybe for legal definition and Black says a word, club has no very definite meaning.

Clubs are formed for also its purposes and there was no uniformity in their constitution and rules.

It is well known that clubs exist which limit the number of their members and select them with great care which own considerable property in common and in which the furnishing of food and drink to the members for money is not but one of the many conveniences with the members -- which the members enjoy.

Now, Little Hunting Park started out as a group of people buying land and putting up tennis courts, a building, swimming pool for their own purpose and those that they elected to join them.

They provided in their bylaws, they setup a secured charter from the State of Virginia.

And in this charter, they use the word community and this is a basis of the petitioner's case as a fact for the use of word “community.”

And looking at Webster's definition of community, community as we think of

now the community meaning a public that was a second definition, the community is a community of interest.

At the same time they drafted bylaws and the bylaws say that they are operating only for their members.

And if they're operating only for the members that cannot be open to the public or it cannot be a community organization.

Warren E. Burger

Did not this club at some subsequent time permit the shares to the treated at least as an incident of a lease hold?

John Charles Harris

No, the provision in the bylaws is this, that an owner and I presume this is because of the many military in the area who were transferred.The owner may assign temporarily subject to the approval of the Board of Directors his privileges not his membership, but his privileges.

He may allow the facilities to be use by his tenant subject to the approval of Board of Directors and this is what happened in particular case here.

We have that Mr. Sullivan who owned a membership in the particular club moot and when moved to other house, he bought another membership and assigned them at the privileges of his membership to his tenant or attempted to assign that the privileges of membership to his tenants in the first house.

Warren E. Burger

Well, (Voice Overlap) he had done that three times before, hadn't he?

John Charles Harris

Yes, but the record will show that not only one of three -- two times before I understand, only one time that he transferred the privileges.

And again he went to the procedure applying to the Board of Directors and asking the Board of Directors, will you prove my tenant for the use of the facilities of this membership and they did.

They allowed him to assign his membership.

Thurgood Marshall

Mr. Harris, why did they deny him?

John Charles Harris

It's in the record, it's something that we say it is in race but when we say that --

Thurgood Marshall

It's just -- can I say it's just color?

John Charles Harris

No, no.

But we can't very well say this because if we did not have prejudice among us today, we won't have any need for the Civil Right Acts.

In this particular case, these people who find and again this is in the record, they find that their membership is dropping.

As their membership drops, they must increase to do, as they increase the do, the membership drops further.

Now, we are in --

Thurgood Marshall

So, you need more members?

John Charles Harris

But this is their and whether right or wrong, they figured with a Negro in the club, they would lose members.

Now, right or wrong it was their conclusion.

Thurgood Marshall

Well, that's traced that he's a Negro.

John Charles Harris

If they brought him in, they would feel that --

Thurgood Marshall

It's because he is a Negro?

John Charles Harris

That's right, that's what I say, it's their --

Thurgood Marshall

That's all I want to hear and then I want to say what right should they have to do?

What right could they have to deny the man privileges as a result of connection with real property on the basis of race alone?

John Charles Harris

Now, --

Thurgood Marshall

I read that it don't need alone what we have got.

John Charles Harris

I would say this and I think that as far if we are talking about a club, if it is club, and we can tie this beside the other -- (Voice Overlap) country clubs which are here in communities.

Thurgood Marshall

Webster somebody you gave a minute ago said club means a whole lot of things.

John Charles Harris

That's right.

Thurgood Marshall

There is no magic can the word “club” isn't it?

John Charles Harris

No, there is no definition other than what Webster says as far as I am concerned.

Thurgood Marshall

This is a place where everybody else who does exact same thing that Dr. Freeman does gets into this recreations center, is that true?

John Charles Harris

In a club and he applied from membership in the club.

Thurgood Marshall

Well, everybody else gets in?

John Charles Harris

No, no.

Thurgood Marshall

Who else got up?

John Charles Harris

I understand that they didn't keep records of anyone who is declined and I had no record of anyone being declined.

But the secretary does testify in here that shipping members of the declination.

Now, whether he's white or any other -- I don't know.

Again, I am not --

Thurgood Marshall

Is that one?

Has the (Voice Overlap) record shows possibly once before it happens?

John Charles Harris

Possibly once before it happens and whether he was a Negro or not I don't know.

Thurgood Marshall

And you say this right which -- do you admit this right is connected with property?

John Charles Harris

In this particular case if it's connected with property, it would've been connected under the Fourteenth Amendment.

If it's connected on the Fourteenth Amendment, Shelley versus Kraemer says that the Fourteenth Amendment any restraint on property is between the party but the Court cannot enforce it.

So, if it is connected with property, --

Thurgood Marshall

Well, not as it answer is it or is it not to make it deprive.

John Charles Harris

I would say no in my opinion.

Thurgood Marshall

Well, how would it get other than that?

John Charles Harris

How would he get for right to go into the --

Thurgood Marshall

Club.

John Charles Harris

Into the club -- again my argument is not moralist because I am not a moralist.

My argument is law and I think that I may feel that it's perfectly wrong to exclude this man.

But, if they have a little right to do so, --

Thurgood Marshall

Well, where did they get the legal right from?

John Charles Harris

Because there's no law prohibiting it.

A club is always had the right to select their members, those who they feel compatible with.

Thurgood Marshall

Well, let's take it this way.

Suppose the whole community out there was labeled a club, would you say a Negro couldn't buy in it?

John Charles Harris

No, I would say that particular case, it would be a definite restraint on the purchase of property.

Thurgood Marshall

Well, I mean they called it club.

John Charles Harris

Now, as far as this --

Thurgood Marshall

Your position is that anything that's labeled a club can discriminate against people because of race, solely because they call it a club?

John Charles Harris

Very definitely not.

Thurgood Marshall

Well, how do you limit it?

John Charles Harris

I think that a club is what we know as a club if in this particular community here, 85% of the people did not belong to this particular club only 15% of this particular community did belong to the club.

There were anyone I could go down and actually apply for membership, but whether we would be accepted, I don't know and I think that --

Thurgood Marshall

Well, who was ever rejected one?

John Charles Harris

I don't know.

I can only go by the record.(Voice Overlap)

Well, one was -- if I may, Justice.

Thurgood Marshall

Go ahead.

John Charles Harris

In June, I think I believe it was May or June if I may quote you, you say Negro-Americans have just as many beautiful people in mind and body as well as in skin as any other group.

And we have just as many stinkers as any other group and I could agree with that perfectly but --

Thurgood Marshall

Well do you think that is the state court?

John Charles Harris

No, what suppose that he is suppose the only --

Thurgood Marshall

Well how do you say that?

John Charles Harris

Suppose that we do have a stinker who happens to be a Negro, do we have accept him?

Thurgood Marshall

I think he'd have to show he's a stinker.

John Charles Harris

Then if we go --

Would it be sufficient for us to determine that Dr. Freeman is a stinker on our evidence and turn him out of the club.

Thurgood Marshall

To all of these, and I am sorry, in his experience he was refused and he admitted having been refused solely because he was a Negro, you said that, am I right?

John Charles Harris

He was refused because when economic concern by the Board of Directors for the good of their corporation.

Thurgood Marshall

And if he'd been white, they could accept him?

John Charles Harris

Probably, I don't know.

I really -- I am not, wasn't a member of the board and I have never been, so I don't know what they would determine.

Thurgood Marshall

All I am asking is (Inaudible).

Hugo L. Black

Where is this club?

John Charles Harris

It's in Fairfax County Your Honor, in an area known as the Bucknell which is just south of Alexandria.

Hugo L. Black

But how do you say -- why do you say it's a club I have questioned that?

John Charles Harris

It's a club insofar as these people didn't get together and built a club house, a swimming pool, tennis courts, they have members, they delegated to the Board of Directors the right to select members after they got initial members in.

Hugo L. Black

But ordinarily a membership is not bought by a house.

John Charles Harris

This is something where it is very unique and it isn't --

Hugo L. Black

You usally pay dues to go to a club.

John Charles Harris

There is no buying of membership with a house.

I think that again the record will show that this was not a standard procedure where a man will sell his membership to his tenant.

But, what they did is in starting off again I think the founders --

Hugo L. Black

Well, did they organize the corporation with the understanding that they would not sell any houses to call the people?

John Charles Harris

No, they had nothing to do with houses.

The only thing is different between on this and --

Hugo L. Black

Well, will they own the houses, didn't the corporation own the houses?

John Charles Harris

No, they don't know any houses.

Hugo L. Black

Who own the houses?

John Charles Harris

Nobody owns any houses as far down there as far as -- and the except for the individual owners.

Hugo L. Black

Do they live in them?

John Charles Harris

Members of the corporation live in, members of the club live in the houses in the community.

Hugo L. Black

Well, they are living in the houses because they are members of the club, is that right?

John Charles Harris

No, in this particular community, only 15% of the people belong to the club.

The rest do not belong to the club, they may belong to the other club which is about Valley High Country Club or they may belong to Woodlawn country club.

But in this particular case, is 15% of the people living in this community.

Now, the only thing it makes this different from the average club is when you join a club, a country club for swimming, golf whatever, you pay an initiation fee.

Now, in this particular case and this is unusual but it's not --

Hugo L. Black

You have to buy house for initiation fee, don't you?

John Charles Harris

No houses involved, you don't -- you know you can be in apartment --

Hugo L. Black

I don't quite get it and I thought what you said that he got each one of that house.

John Charles Harris

No, I imagine that maybe some people living in apartments who belong to this club.

Hugo L. Black

In that community?

John Charles Harris

There's no apartments in the community that I know of --

Hugo L. Black

Well, who build the houses?

John Charles Harris

I don't know, I believe the builder it was guys --

Hugo L. Black

I am not talking about who actually put them up.

Who own them when they were built?

John Charles Harris

Well, is a rather large area (Voice Overlap) 20 and 30 builders.

Hugo L. Black

But who own the house?

I am not asking that.

Who own the house when they were built?

John Charles Harris

I really don't know, there is say that it's the land was originally known by Bucknell, owned by Bucknell University who sold off land to builders and builders came in to build houses.

Hugo L. Black

So, why they came and built houses?

John Charles Harris

Yes, it's a great land (Voice Overlap) regular community.

Pardon.

Hugo L. Black

Who did they build them for?

John Charles Harris

For anybody would buy them.

Hugo L. Black

Anybody who would buy the house?

John Charles Harris

Yes.

Hugo L. Black

So, that they do own the house individually as you say.

John Charles Harris

The -- yes, and the individual members who don't have houses, they maybe on apartment but houses have nothing to do with the club.

Warren E. Burger

Are you telling us that on this record there's no connection between the ownership of the house and the membership of the club?

John Charles Harris

Positively not other than the fact that the membership privileges membership, they would allow an owner and the purpose of this was if an owner was transferred overseas he could transfer his privileges to his tenant while he was gone.

And this is the only thing and this is what -- this is the procedure that they are bringing up.

Hugo L. Black

Has that crucial issue have been tried?

John Charles Harris

Yes, this is been tried in the county court and a county court ruled --

Hugo L. Black

What about the appellate court?

John Charles Harris

The appellate court hasn't heard it because of the procedure involved.

Hugo L. Black

Now, suppose we would decide that the appellate court was wrong, would you still get that issue tried out?

John Charles Harris

Certainly, I mean if you --

Hugo L. Black

You could still try the issue of dispute there, is that right?

John Charles Harris

Yes, I think that if we would manage it to Virginia Court.

Hugo L. Black

Are you asking for that privilege?

Are you asking for that privilege if we reverse it on the procedure ground?

John Charles Harris

I would prefer because I think it is the correct thing to do.

Hugo L. Black

I didn't see it in your brief.

John Charles Harris

No, it's not on the brief, but I think it would be the correcting to do in my opinion.

Alright, now Mr. --

Warren E. Burger

Well, if we reverse on the procedural grounds suggested by my Brother Black, there would be no alternative; you'd be back in the Supreme Court of Virginia, would you not?

John Charles Harris

That's right we would.

I guess Virginia with the mandate and the reason why they were -- it was remanded to them, the other time they just said that the other case was a case involving a sale of a house and they do their case out or throughout before in the basis of procedure.

But, there's one thing as far as the mootness of this question.

Mr. Freeman is not looking for any admission to this club, he is looking for damages and if he is not entitle to damages, then the question is moot and this Court should not consider moot question, so I understand.

But if the only way he can get in my opinion, the only he can get damages is under 1982.

And if 1982 as Jones versus Mayer does not allow damages then the question is moot as far as criminal is concern.

He is on Pakistan now, he is not asking for --

About Mayer has to say that?

John Charles Harris

It does -- it says it does not.

Just for reserve.

John Charles Harris

Okay, it makes no that -- contains no provision allowed can be enforce by injunction that contains no provision expressly authorize in the Federal Court order the payment of damages.

Thurgood Marshall

But doesn't the Federal statute say an Act should be that law or in equity?

You can see it in statute, doesn't it say that?

John Charles Harris

I am really -- I am not familiar with --

Thurgood Marshall

There have been cases from other Civil Rights that damages had been awarded by this Court.

John Charles Harris

But if I'm going to back to the public --

Thurgood Marshall

Submit them all right with one.

John Charles Harris

Under the public accommodation section and which is Title 42 which is included -- includes 1982.

In there and of course Mr. Brown is just admitted that there is no damages under the public accommodations law.

It's strictly consolatory and there is a provision for referral to a mediation service, but there is no damages under the public accommodations law except for the granting of counsel fees.

Now, there's also an error, it says but this shown, I preclude the assertion of any other federal State law or federal or State law not inconsistent.

And if we look at the Charlotte v. (Inaudible), we'll see that the natural application was an assault with a rule that there was no provisions -- no damages under the public accommodations law.

But in a case of an assault in connection with the discrimination, you could sue for damages on assault.

So in my opinion, there is no provision for damages under 1982 or under the Public Accommodation Section to the Civil Rights Act and this is what you're talking about.

They are not really talking about land because if they're talking about the Fourteenth Amendment and then unlawful restriction on land, then we did not enlist the aid of the State Court to enforce of restrictive covenant.

They are suing us.

This does mean that all you have to do to bring the Fourteenth Amendment down to individuals is the file suit against that individual.

And the Barrows versus Jackson case, it was a question of the Court coming in, calling on the Court to a system to take damages against someone who violate and restricted of covenant.

Shelley --

Can I ask you a question about the eligibility, you were to explain, could I, as a resident District of Columbia, who has never owned property in (Inaudible) County, lived in (Inaudible(County, would I be eligible to go ahead in this claim?

John Charles Harris

Yes you would.

I would?

John Charles Harris

There are people living in Alexandria and I believe there is, I am not sure about if there is one living now living in Washington DC.

Again it would be rather impractical because a club must be in an area close to those members as far as going to Spokane, to White Bridge -- this would a little silly.

You'd have to have your Bridge Club in here and a reason for -- the reason why we don't have more people in the District of Columbia or even in Arlington is because of the fact that it's further away, it's to far to travel.

So, but probably if you look at District of Columbia and you would like to apply why I think you'd have a good chance of becoming a member.

Warren E. Burger

I think the time is up, how about the answer?

John Charles Harris

I think same thing was replied to Justice Marshall.

Potter Stewart

Excuse me the petitioner's brief if I may just follow up Justice Harlan's question.

The petitioner's brief seems to say and I'm looking at page six.

The corporations bylaws provide that shares maybe purchased by adult persons who “reside in or who own or who have own housing units and one of those specified subdivision” it doesn't to be sure explicitly say that the shares are limited only to those people.

But the implication I got from that brief was that they were limited only to residence of the neighborhood or people who had been tenants or residence of the community.

John Charles Harris

This is in the geographical -- it's a rather wide area with geographical limit that was originally put in there, but never in the record will show that it hasn't or

actually ever adhere to.

And again there's one thing that's left off there, there must also be approve by the Board of Directors which is a third requirement.

Warren E. Burger

Mr. Brown, you have seven minutes left.

Allison W. Brown, Jr.

I would simply like to say that with respect to the question of the attributes here that suggest that this membership in this association maybe an incident of land or real property.

I would point out that there are several factors, for example the bylaws provide that shares may only be purchased by a residence in specified areas.

Byron R. White

But the bylaws don't say that being a resident in the area is the only qualification for membership.

Allison W. Brown, Jr.

No, they do not.

Byron R. White

And the Board of Directors still has to pass on applications for membership although applications according to bylaws are limited to residence.

Allison W. Brown, Jr.

That's correct, yes sir.

I'm just pointing out that it has some of the incidents of running with the land.

Byron R. White

Because there is something in the record that indicates that residents of these

areas, specified areas automatically qualified for membership?

Allison W. Brown, Jr.

No, they do not automatically, they were always subject tp condition of approval by the board, is that what you mean?

Byron R. White

Yes, but at also -- but is there something in the record indicates that the board automatically gave approval to residents?

Allison W. Brown, Jr.

Well, record shows that --

Byron R. White

May perhaps the board had the right to approve them but does the record shows that this is an automatic matter residence of these specified areas qualified in membership without more?

Allison W. Brown, Jr.

Well, going to the -- to be accept that we pointed it out on page seven of our brief that there had been 1183 shares, membership shares issued in this corporation.

Byron R. White

Is that in the record?

Allison W. Brown, Jr.

Yes sir, pages 125 to 126, I believe.

It's on page seven of the brief, on the record citations --

Byron R. White

Has there ever been any rejections?

Allison W. Brown, Jr.

Only the -- the record only suggest as Mr. Harris indicated that there was one possible rejection at one time because there is no indication of the record is why that rejection occurred.

Byron R. White

Do you agree with him that people who are not residents of these specified areas may apply for membership?

Allison W. Brown, Jr.

There is some evidence in the record, yes that people who do not belong why residence in those areas may apply.

Because there is this clause which provides that the area maybe it's sort of elastic.

It can be extended by the Board of Directors, but I would point out that these considerations are not really controlling, that is the elasticity of the boundaries.

I mean under Section 1981 and 1982 of 42 U.S.C, the question is, do we have the incidents of a contract present in this case?

Do we have the incidents or either personal land or real property?

And the fact that it may or may not be an incident of real property alone is not the controlling question.

I would like to mention one other thing or two or three other things rather.

One thing Mr. Harris suggested that if damages are not allowed, Dr. Freeman, the case becomes moot because he is not entitled with injunctive relief.

We do not believe that is so, Dr. Freeman is for example here in the foreign service of the United States.

He can return to this area at any time and he should be entitled to injunctive relief to prevent future recurrence of the discrimination if he should move back into one of the house for example that he lived in for or some other house within the subdivision neighborhood served by this association.

Now, one very important --

Hugo L. Black

May I ask you a question, I don't hink on the merits, but how far is this club of Hunting town?

Allison W. Brown, Jr.

It's about four miles south of there -- sir about three or four mile south near Fort Hunt Road and it's about half way between Hunting Towers and Mt. Vernon off of Fort Hunt Road.

And it's in the area that is surrounded by residential areas except on one side, it's contiguous to a school yard.

The Bucknell elementary school, a public school is contiguous on one side of this property.

Hugo L. Black

Is that the name of the locality of Buck Hill?

Allison W. Brown, Jr.

No, Bucknell.

Hugo L. Black

Bucknell?

Allison W. Brown, Jr.

Yes, it -- that's correct Bucknell.

Warren E. Burger

Before we get away from that procedural point, could you tell me this.

What is the scope of our review of the action of a State Court in interpreting its own jurisdiction, do we for example may we reverse if we simply disagree with it, would have arrive to the different decision or is there higher standard that must be met?

Allison W. Brown, Jr.

Well, the question I think as I would read the decisions is whether the State

Court denied the appeals in this case on arbitrary grounds.

If it was acted arbitrarily and unreasonably not just did it misinterpreted its own rule.

I think, I maybe wrong on this, but as I understand that the Court will inquire into the reasonableness of the interpretation that the State Court has given to state procedure.

And we believe --

Byron R. White

But the consequences if we don't agree for the State Court what we would say is, this not an adequate state ground and we didn't get to the merits here.

Allison W. Brown, Jr.

Correct.

Byron R. White

They would be remand it.

Allison W. Brown, Jr.

That's right, that's correct.

Absolutely, that you would decide the case on the merits here that a very -- there are number of cases that we have cited in our brief on this issue.

Now, the one thing that we feel it is particularly important and that is that the case is not be remanded at the Virginia Supreme Court of Appeals because they have already ruled that they don't have jurisdiction in the case.

And we have pointed out for example the case in our brief, the case of Naim v. Naim which should involve a test that the Virginia anti-miscegenation laws where the Virginia Supreme Court under the circumstances quite comparable to this refuse to accept the remand, completely frustrated that this Court's mandate by failing to provide the kind of relief to the Court had directed it to provide.

So, we submit that this case should be treated as one being on a writ of certiorari to the Circuit Court of Fairfax County and that it should returned to the Circuit Court of Fairfax County for entry of a decree as ordered by this Court

and for the assessment of damages of that being, that is the only issue and that it should go directly back to the Circuit Court of Fairfax County.

Thank you.

Hugo L. Black

For you to have a decree I understood from your adversary that the Court haven't pass on the merits of the case, is that right or not?

Allison W. Brown, Jr.

The Virginia Supreme Court of Appeals refuse to accept the appeals and therefore it's no different in a situation where a highest Court in the exercise of its discretionary jurisdiction decides that it won't review the case and that's what the Court did here in effect.

So the matter -- there are no further matters for the Virginia Supreme Court of Appeals to decide once this Court has answered the federal issue is involve, resolved the federal is involved and if that so and then it should remanded to the Circuit Court of Fairfax County.

Warren E. Burger

But the Supreme Court of Appeals of Virginia has never touched the merits.

Let's assume hypothetically that it was remanded there and they heard the case and decided with you on the merits, you should have all you wanted, wouldn't you?

Allison W. Brown, Jr.

So, the Court -- you already tried to do that once with all due regard due respect.

You (Voice Overlap) --

Warren E. Burger

Well, sometimes that --

Allison W. Brown, Jr.

You try that once you told the Virginia Supreme Court of Appeals to take the

case back reconsider it on the merits in the light on Jones versus Alfred H. Mayer Company and that Court refused to comply with this Court's mandate.

Now, that there are cases in this Court reported case that would suggest that the appropriate remedy and such an instance would have been for us to apply for a writ of mandamus against the Virginia Supreme Court of Appeals, we do not do that.

We chose this method of seeking review on a writ of certiorari in this Court and have urged in our brief that this Court decide the case on the merits and we think that's way about the appropriate thing to do now.

That the Virginia Supreme Court of Appeals has already violated its responsibilities under the supremacy clause in Constitution.

Byron R. White

Could I ask you how may other swimming pools there are in the subdivision listed in the bylaws?

Allison W. Brown, Jr.

There are none and to my knowledge in the subdivisions listed in these bylaws.

Byron R. White

Private or public either one?

Allison W. Brown, Jr.

Private or public neither.

Warren E. Burger

Thank you.

The case is submitted.